JUDICIAL LIMITATIONS AFFECTING VENUE OF TRANSITORY ACTIONS.

THE principle that a transitory action may be commenced and prosecuted in any jurisdiction where the defendant may be personally served with process is of such long and universal recognition (except where limited by express statutes) that the exceptions to the rule and the frequent injustice of it have often been lost sight of, though these exceptions are now the features of the rule which have most practical interest. It is readily conceivable how serious a hardship may be imposed on the defendant who happens to be sued at a point far from his domicile and from the place where the cause of action arose and where all of his witnesses may be. In such a case he can not have compulsory process for his witnesses and may be wholly unable to persuade any of them to attend voluntarily. Even though he may be able to persuade them to attend, he may be unable to meet the necessary expense. In addition to this, he may be subjected to the necessity of having to attend court far from home with the consequent inconvenience and expense. While these hardships are not so great in the case of railroad or similar corporations doing business in a large number of states, the greater injustice results to them because of a more frequent occurence of such situations. It is through an appreciation of these conditions that the courts have been led to formulate some limitations upon this supposedly unqualified right.[1]

Thus the Tennessee Supreme Court has held that a non-resident may be sued in Tennessee upon a transitory action arising elsewhere provided the defendant was within the territorial ju-

[1] No attempt is made here to discuss statutory limitations. The U. S. Judicial Code, § 51, provides that where federal jurisdiction rests upon diversity of citizenship, suit shall be brought "only in the district of the residence of either the plaintiff or the defendant." See Ladew *v.* Tennessee Copper Co., 218 U. S. 357. State statutes limiting the general rule as to where transitory actions may be brought are quite frequent. A rather comprehensive review of these statutes will be found in 40 Cyc. 94 *et seq.*

risdiction of the court *at the time the suit was instituted* and the process served, but not otherwise. So that a plaintiff may not file a suit against a non-resident before he comes into the county, place the process in the hands of an officer and lie in wait, so to speak, for the defendant. A plea in abatement is good in such a case.[2]

The recent decision of the Federal Supreme Court in Simon *v.* Southern R. Co.,[3] furnishes another interesting exception to the general rule. It there appeared that Simon had brought suit in the Parish of Orleans against the Southern Railway Company, which he alleged was a Virginia corporation doing business in the city of New Orleans, to recover damages sustained by him through its negligence while he was a passenger on its line in the state of Alabama. Process was issued and served upon the Assistant Secretary of State, the Secretary of State being absent at the time of service. The Louisiana statute provided that it should be the duty of every foreign corporation doing business in the state to file a written declaration setting forth the places in the state where it is doing business and the name of its "agents in this state upon whom process may be served." It further provided that when any such corporation should do business of any nature in the state without having complied with this requirement, it could be sued "for any legal cause of action" in any parish in the state where it was doing business, and that service of process in such suit might be made upon the Secretary of State "the same and with the same validity as if such corporation had been personally served." There was a judgment by default and on a "trial by jury on confirmation of default" there was a verdict in the plaintiff's favor for the entire amount sued for—something over $13,000.00. Afterwards the Railway Company, on learning of the judgment, filed this bill in the United States Circuit Court for the District of Louisiana against Simon to enjoin any enforcement of it. Two questions elaborately argued were, that service on the Assistant Secretary of State was not good because the statute provided only for service on the Secretary himself, and also that the Southern Railway Company was not

[2] Carlisle *v.* Corran, 85 Tenn. 165, 2 S. W. 26.
[3] 236 U. S. 115.

"doing business" in Louisiana. The Federal Supreme Court, in making the injunction permanent, passed by both of these questions and held that the service was bad on the ground that service of the kind provided for in the statute was only available *where the cause of action arose in Louisiana.* Mr. Justice Lamar said:

> "But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts, wherever made, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in Old Wayne Mut. Life Asso. *v.* McDonough, 204 U. S. 22, 51 L. Ed. 351, 27 Sup. Ct. Rep. 236, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

It seems clear, therefore, that the requirement of foreign corporations, now so common, that they shall designate some person in the state upon whom service of process may be had is of no effect so far as process in suits on causes of action arising outside of the state are concerned. The Federal Supreme Court, in the Simon case[4] did not confine itself to a mere construction of the Louisiana statute but clearly indicated a limit upon the power of the state.

Still another limitation upon the assertion of transitory rights of action in jurisdictions outside the state where the cause of action arose is found in the jurisdiction, not infrequently exercised, of the courts of equity in the state where the cause of action arose and where both parties reside to enjoin the bringing of a suit in another state or in a foreign country. That such jurisdiction is inherent in equity courts is now too well established to permit

[4] *Supra.*

of serious controversy and the only question open in such cases, where both parties reside in the territorial jurisdiction of the court, is whether under the peculiar facts in the particular case the injunctive power ought to be exercised. The fundamental basis of such jurisdiction is the right of equity courts to enforce the maxim of *sic utere tuo.*

The inability of the defendant to the transitory action to have compulsory process for his witnesses, the additional inconvenience and expense to him in attending upon a foreign tribunal, the fact that the law of the foreign state is more favorable to the plaintiff's case than the law of the domicile of the parties, that the plaintiff is seeking to avoid the law of the parties' domicile, and similar considerations are those usually relied on as the basis for equitable relief. As a rule, no single one of the considerations just mentioned is sufficient to justify equitable interference; but the combination or collocation of all of them is usually regarded as sufficient. The purpose of the plaintiff in going to a foreign jurisdiction is also of importance, but as a rule this can only be proven by inference from his conduct.

A quite recent case of importance in this connection is one that arose in Memphis. A Dr. Fisher brought suit there against an insurance company to recover on an accident policy for the death of his wife, which was due, he claimed, to an accident occurring on a street car in Memphis. All of the witnesses lived there. The suit was bitterly contested and was tried four or five times before a court and jury, resulting always in a mistrial except in one instance in which there was a verdict and judgment for the plaintiff which was reversed by the Supreme Court. The plaintiff, after this litigation had been going on for some years, dismissed his suit and brought a new suit in one of the southern counties of Mississippi far removed from his own residence and that of the witnesses and from the place where the cause of action had arisen. At the suit of the insurance company, the Chancery Court at Memphis granted an injunction to restrain a prosecution of the suit in Mississippi. The right of the Chancellor to issue the injunction and his action in punishing Dr. Fisher for violating it was upheld by the Court of Appeals though the question whether the facts justified the injunction was not discussed,

the case having come up on an appeal from a judgment of contempt.[5]

Another interesting case, but not reported as there was no appeal, is that of Brewer *v.* Shackleford. Mr. Shackleford, a resident of Mississippi, conceiving that he had been libeled by Governor Brewer, of that state, brought an action at Memphis against the Governor for libel and had process served on him there. This suit was then brought in the Chancery Court of Washington County, Mississippi, by Governor Brewer against Mr. Shackleford to enjoin the prosecution of the suit at Memphis on the ground that both were residents of Mississippi, that the cause of action arose there, that the law controlling the cases was that of Mississippi, that the witnesses all resided there, that no compulsory process for witnesses could be had if the case was tried in Memphis, that the trial at Memphis would subject the defendant to great and unnecessary inconvenience and expense and that the purpose of the plaintiff in bringing his suit in Memphis was to obtain an unconscionable and inequitable advantage. The injunction was granted and there was no appeal.

O'Haire *v.* Burns,[6] which is the authority most frequently considered on questions of this kind, was a case in which both parties resided in Colorado. Burns had been sued in Colorado by O'Haire but there was a judgment in his favor in the trial court. O'Haire took an appeal to the Supreme Court of Colorado which resulted in a judgment of affirmance finally disposing of the cause of action O'Haire had propounded. Thereafter, Burns, as president and director in an Iowa corporation, was obliged to and did attend an annual stockholders' meeting at Council Bluffs, Iowa, more than 500 miles from the common residence of himself and O'Haire in Colorado. While in attendance on that meeting at Council Bluffs, Burns was served with process in a suit begun there by O'Haire against him on the same cause of action as was involved in the Colorado suit. He returned to his home and there brought this injunction suit against O'Haire to restrain him from further prosecuting the suit in

[5] Life Ins. Co. *v.* Fisher (Tenn. Civ. App.), 5 Higgins 233.
[6] 45 Colo. 432, 101 Pac. 755, 25 L. R. A. (N. S.) 267.

Iowa. It was argued against the injunction that if Burns contentions were true that the differences between the parties had been finally adjusted in the Colorado case, he had nothing to do in the Iowa case except to file a plea of res judicata and support it by a certified copy of the Colorado judgment. The Colorado Supreme Court, in sustaining the injunction, said that this was no doubt true, but added:

> "But why compel him to go over 500 miles to a foreign jurisdiction from that from which both parties reside, or from where the original cause of action, if any, accrued, from where the property over which the original contention arose was situated, and from where all witnesses reside, in order to present these facts to a foreign tribunal? We have been furnished with no principle of law or equity, nor process of sound reasoning, why this should be done, and are of the opinion that none can be presented."

The case of Dinsmore *v.* Neresheimer,[7] was one in which the Adams Express Company of New York was sued in the District of Columbia by a citizen of New York for the loss of a shipment. The New York Court of Appeals had held in an earlier case that a stipulation in the receipt issued by the express company, limiting the value of the goods shipped, was valid; but the District of Columbia courts had taken a different view. It was to escape the effect of the New York law and to recover the full value of the shipment that this suit was brought in the District of Columbia. Thereupon the express company obtained an injunction in New York against the prosecution of the suit in the District of Columbia; and this decree was sustained on appeal, on the theory that it is the province of a court of equity to prevent one party from taking an unconscionable advantage of another, that the purpose of the suit in the District of Columbia was to escape the effect of the law of New York and was a purpose which was unconscionable and inequitable. This decision has been referred to with express approval by the Federal Supreme Court.[8] The argument was probably made in that case, in opposition to the injunction, that the District of Columbia

[7] 32 Hun. 204.

[8] Cole *v.* Cunningham, 133 U. S. 107.

courts could be relied upon to enforce the law of New York; but the court evidently regarded that argument as not persuasive, and must have had in mind the view later expressed by the Maryland Court in Miller *v.* Gittings,[9] where the Court justified its injunction on the ground that the complainant was subjected to prosecution before a tribunal in another state, which had to ascertain the law through imperfect methods of proof.[10]

The Tennessee Supreme Court has recently decided an interesting case in this connection, American Express Co. *v.* Fox.[11] That was a bill to enjoin Fox from prosecuting an action at law in the Circuit Court of DeSoto County, Miss., to recover damages for an accident which occurred in Memphis, Tenn. After the accident, the express company had settled with Fox and taken a release, paying him $50.00; although it denied liability. Later Fox repudiated this release, and brought suit in the Circuit Court at Memphis to recover large damages. This case was removed to the Federal Court where Fox took a non-suit, and thereafter brought his suit in DeSoto County, Miss. for an amount which precluded another removal. It was insisted that an unconscionable advantage was being taken of the American

[9] 85 Md. 601, 37 Atl. 372, 37 L. R. A. 654.

[10] Most of the cases in this connection are cited in an extensive note to O'Haire *v.* Burns in 25 L. R. A. (N. S.) 267. Other authorities not there cited are: 2 POMEROY ON EQUITABLE REMEDIES, § 670; 1 HIGH ON INJUNCTIONS, 4th ed., § 106; Vail *v.* Knapp, 49 Barb. 299; Gage *v.* Riverside Trust Co., 86 Fed. 984. Reference may also be made to a very complete note of Mr. Freeman appended to his report of Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 59 Am. St. Rep. 859, *et seq.* He points out, among other things: "It may, therefore, with confidence, be affirmed that the court of one state may enjoin the prosecution of a judicial proceeding in another state upon substantially the same grounds that the courts of one nation may enjoin the prosecution of a suit or action in the courts of another nation. It will be found, upon an examination of the decisions upon this subject, that it is not necessary, in order to obtain relief, to establish the usual grounds for equitable interposition, namely, fraud, accident, or mistake, but that it will be sufficient to entitle a citizen of a state to injunction preventing another citizen thereof from prosecuting an action against the former in the courts of another state to show that the purpose or necessary effect of such action is to obtain an advantage to which the plaintiff therein is not entitled in the domicile of the parties. Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Claflin *v.* Hamlin, 62 How. Pr. 284."

[11] 187 S. W. 117.

Express Company, for several reasons: (1) As all the witnesses resided in Memphis it was deprived of compulsory process for witnesses; (2) it was subjected to great and unnecessary inconvenience in that its employees and attorneys would be required to attend court in a foreign jurisdiction; (3) under the law in Tennessee, the plaintiff who has made an accord and satisfaction can not maintain a suit without first returning the amount paid to him on such accord, while in Mississippi no such return of money is necessary; (4) under the law in Tennessee, contributory negligence in such a case is a bar to recovery, while in Mississippi it merely mitigates the damages; (5) in Tennessee the trial judge sits as a thirteenth juror but no such rule prevails in Mississippi. There were other minor features. The Tennessee Supreme Court recognized the jurisdiction in the Chancery Court at Memphis to grant injunctions in cases of this sort; but, after indicating that the facts probably did not warrant the exercise of it, dissolved the injunction, basing its conclusion on the ground that the express company was a joint stock company under the laws of New York, that when sued in Tennessee it had removed the case to the Federal Court, and that as the Tennessee courts were powerless to compel the express company to submit to their jurisdiction and to prevent it from removing the case to the Federal Court, injunctive relief ought not to be granted at its instance when it was sued in a foreign tribunal.

Although this view is announced by a court that is exceptionally able and painstaking, in an opinion by one of the best lawyers of Tennessee, the writer ventures to suggest a doubt as to its soundness. For, passing the question whether it does not violate the Fourteenth Amendment against denying to any person the equal protection of the laws, it means that injunctive relief in such cases will be denied to a corporation merely because it is a foreign corporation, even though the facts might present a very clear case for equitable interference. As a rule, the doors of a court of equity are never closed to a corporation merely because it is organized under the laws of another state, in the absence of some specific statute to that effect. If the proof should conclusively show a case in which the defendant by bring-

ing his action in a foreign jurisdiction was taking an inequitable and unconscionable advantage of the plaintiff, could it fairly be said that the complainant ought to be denied the protection of a court of equity merely because it happened to be a foreign corporation, particularly where it was doing business in the state under the sanction of the laws of the state? In the earlier case of Turcott *v.* Yasoo & M. V. R. Co.,[12] which was an action to recover for personal injuries, the defendant, a corporation of Illinois doing business in Tennessee, pleaded the Tennessee statute of limitations. Plaintiff replied that defendant was a foreign corporation and therefore a non-resident, so that it could not rely on the statute. The Court held the replication bad and, after pointing out that foreign corporations, particularly railroad companies, constantly exercised their functions and franchises outside the state of their incorporation, said:

> "In such a case, where is the corporation? If it be said that it still dwells in the place of its creation, and is acting elsewhere only by agents, the answer is no more by agents elsewhere than in the place of its creation. It can do nothing anywhere, nor manifest its presence or being at all, except through its agents, its property, or its operation. Where these are then it seems most accordant with substantial fact and reason to say, *there is the corporation?*"

This would seem to establish the rule that a corporation of one state lawfully doing business in another is, as to all of its acts and doings in the latter state, a resident *pro hac* of the latter state in determining its rights, duties and liabilities as to third persons.

The opinion of Judge Thomas L. Maxwell in Chicago, B. & Q. R. Co. *v.* McMahon,[13] decided by the District Court of Iowa, is quite interesting in this connection. The railway company, a corporation of Illinois but operating lines of railway in Iowa and adjoining states, brought this bill of injunction against McMahon, a resident of Iowa, to enjoin him from prosecuting an action for damages in St. Paul, Minn., against the complainant for an injury sustained in the Maryville collision which occurred in Iowa. A number of authorities were examined and

[12] 101 Tenn. 102, 45 S. W. 1067. [13] 51 Nat. Corp. Rep. 603.

reviewed, and the jurisdiction of the Chancery Courts to issue injunctions in such cases was sustained and an injunction held proper under the facts. A part of the opinion reads:

"At the annual meeting of the State Bar Association of Minnesota, in 1914, the Ethics Committee of that association called attention to the growing practice of some of the lawyers of the state in soliciting personal injury cases outside of the state. It is stated that an investigation proved that a number of lawyers regularly employed solicitors to solicit such cases, one firm alone having in its employ forty-five railroad employees as solicitors. It is also stated that at that time there were personal injury actions pending in that state against railroad companies, by non-residents, who had a remedy at home, in which it is sought to recover $6,358,522. There were in all 341 of these cases, 198 of them in Ramsey and 65 of them in Hennepin County; 209 of these were in the hands of four law firms.

"It is shown by the evidence here that the defendants' attorneys * * * have one or more solicitors in their employ in this state, and that said firm has pending in the courts of Ramsey and Hennepin Counties in Minnesota 32 such cases which arose in Iowa, for residents of Iowa, wherein the aggregate amount sought to be recovered is more than $550,000.00 and some 20 cases from other outside states where the aggregate amount claimed is more than $295,000. It is shown that, as a general practice, some of these soliciting attorneys advance money to the litigants for maintenance pending the litigation, and also pay the expenses in the preparation and trial of the cases; but in this case there is no evidence that there is any agreement between the defendant and his attorneys other than a contingent fee contract, which is legally unobjectionable in this state. If a court of equity may, in the exercise of its undoubted power, rightly do something towards discouraging this scandalous practice and wholesale violation of the rights of the residents of its own state, it ought to do so. In addition to the case of the defendant which is the subject of this action, there are four other like cases pending in the courts of Ramsey County in which residents of the city of Creston are plaintiffs, asking for the recovery of an aggregate amount of $65,650.00 against the plaintiff in this action. It is shown that the plaintiff will require the attendance of at least twenty witnesses who reside mostly at Creston in presenting its defense to defendant's action

now pending in the Courts of Ramsey County, Minnesota, where it can not have compulsory process to secure the attendance of such witnesses. Every lawyer knows the inadequacy of his right to take and present depositions in such cases. It is also well known how uncertain the time when a case will be actually reached for trial in a court with a congested docket is, yet the plaintiff must be ready with its witnesses, books, records, etc., when the case is reached for trial, regardless of the fact that such witnesses reside 450 miles from the place of trial.

"I think it is clear that the plaintiff would labor under great disadvantage in protecting its rights in such a trial, to say nothing of the vastly increased cost and expense to which it would be subjected. In so far as I am not limited by the decisions of our own Supreme Court, I am ready to hold that the prosecution of the action in question in the Courts of Minnesota is the doing of an 'inequitable thing' by the defendant. That he is thus 'obtaining an inequitable advantage' over the defendant in that cause. That in order 'to do justice, and to prevent one citizen from obtaining an inequitable advantage over another citizen' of this state, the defendant should be restrained from prosecuting his said action.

"Paraphrasing the language of the Court in O'Hara *v.* Burns, 45 Colo. 432, why compel the plaintiff to go 450 miles to a foreign jurisdiction from that in which both parties reside, in which the original cause of action, if any, accrued, and from where all the witnesses reside, in order to present these facts to a foreign tribunal? 'We have been furnished with no principle of law or equity, nor process of sound reasoning why this should be done, and are of the opinion none can be presented.' "

Another side of the question is presented by the case of Atchison, etc., R. Co. *v.* Sowers,[14] where was involved a statute of New Mexico giving a right of action for personal injuries and providing that suit should be brought only in that territory. The statute was preceded by a recital to the effect that, "it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories, to the increased annoyance and manifest injury and oppression of busi-

[14] 213 U. S. 55.

ness interests of this territory and the derogation of the dignity of the courts thereof." Notwithstanding this statute, the Federal Supreme Court affirmed a judgment obtained by the plaintiff in Texas for an injury which occurred in New Mexico, although the case was based upon common law principles. The Court observed, however, that the plaintiff in such a case was bound by the New Mexico statute in so far as it required certain preliminary steps to be taken by the plaintiff and limited the time for the prosecution of the suit.

A similar question later arose which involved an Alabama statute giving the right to a servant to recover against his master for an injury occasioned by defective machinery, but providing that all actions under that Act "must be brought in a court of competent jurisdiction within the state of Alabama and not elsewhere." The plaintiff, an employee of the Tennessee Coal & Iron Company, was injured in Alabama and brought this suit in the City Court of Atlanta, basing his action on the Alabama statute. There was a plea in abatement on the ground that, the right of action being statutory, the suit could be maintained only in Alabama by express provision of the statute and that the requirement of the statute as to the venue of the action was a qualification of the right created by the statute. To this plea there was a demurrer which was sustained by the Federal Supreme Court.[15] There was an effort in that case to distinguish the Sowers case on the ground that the latter case was based on the common law; but the court said:

> "That distinction makes no difference between the two cases because in New Mexico common law liability is statutory liability—the adopting statute providing that the common law as recognized in the United States shall be the rule of practice and decision."

Aside from that, the court pointed out further that the decision in the Sowers case was not based on the fact that the suit rested on the common law liability, but "on the general rule that a transitory cause of action can be maintained in another state even though the statute creating the cause of action provides that it shall be asserted in local domestic courts."

[15] Tennessee Coal, etc., Co. *v.* George, 233 U. S. 254.

Mr. Freeman, the well known annotator, in a note to Eingartner *v.* Illinois Steel Co.,[16] discusses the discretion in the courts of one state to decline jurisdiction of a transitory cause of action arising in a sister state. He cites several cases indicating that such discretion exists and states that there is a considerable conflict of authority on the question. It is probably true that the courts of one state may decline to enforce a penalty created by the statutes of another state, and undoubtedly they may decline to enforce a right of action which is opposed to a well defined policy of public morals. Pretermitting these exceptional cases, the holding of the Federal Supreme Court in the Sower and George cases, above reviewed, seems to settle the proposition that no such discretion resides in the state courts.

The case of Whitlow *v.* Nashville, C. & St. L. R. Co.,[17] was an action in Tennessee to recover for the wrongful death of the plaintiff's intestate, which had occurred on the defendant's line in Alabama. The point was made and successfully maintained in the lower court that the Alabama statute (which was, in a general way, the usual statute authorizing recovery for wrongful death) was a penal statute and for that reason could not be enforced in the courts of Tennessee; also that the Alabama statute and the statute of Tennessee giving the right of action for wrongful death were so dissimilar in their purposes and manner of enforcement that the courts of Tennessee would not undertake to enforce the Alabama statute. Both of these contentions were declared untenable by the Supreme Court of Tennessee on the ground that while the courts of Tennessee would decline to enforce the penal laws of another state, the statute of Alabama involved was not in any sense a penal statute. Penal laws were defined as those imposing punishment for an offense committed against the state. "The test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." [18]

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[16] *Supra.*

[17] 114 Tenn. 344, 84 S. W. 618.

[18] Whitlow *v.* Nashville, C. & St. L. R. Co., *supra*, citing and reviewing Huntington *v.* Attrill, 146 U. S. 657, and Wisconsin *v.* Insurance Co., 127 U. S. 265, both of which deal at some length with what are penal actions and how far the courts of one state should enforce such actions

It seems to be a fair conclusion from the foregoing that the right to bring suit on a transitory cause of action wherever the defendant may be served with process is not an absolute one but is subject, not only to such qualifications as may have been imposed by statute, but to the controlling discretion of courts of equity where a recognition of the right would mean the unconscionable oppression of the defendant; that such right, like all others, must yield to the ancient rule of conduct *sic utere tuo ut alienum non laedas*. It also appears, however, that the power of a state to limit the venue of actions arising under its laws to its own borders is subject to severe limitations if, indeed, the power exists at all.

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arising in another state. The opinion of the Tennessee court in the Whitlow case is an interesting discussion of these questions and reviews the authorities at some length.